Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-645

ROMA McKINNEY, ET AL.,

Petitioners,

v.

PENNZOIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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October 5, 1979

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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No......

ROMA McKINNEY, ET AL.,

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v.

PENNZOIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on May 21, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 598 F.2d 1339.

JURISDICTION

The judgment of the United States District Court for the Southern District of West Virginia was made and entered on September 15, 1977, the judgment of the Court of Appeals for the Fourth Circuit was made and entered on May 21, 1979, and the final order of the

Court of Appeals for the Fourth Circuit denying petitioners' motion for rehearing was made and entered on July 12, 1979. Copies of the foregoing are appended to this petition in the Appendix at pp 11a, 1a-10a, and 11a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners are entitled to a jury trial on the issue of what constitutes a reasonable or unreasonable exercise of respondent's oil and gas rights under the Seventh Amendment to the United States Constitution?

2. Whether it is abuse of discretion for the federal circuit court to decline to certify unsettled or disputed questions of state law to the Supreme Court of Appeals of West Virginia, pursuant to the Uniform Certification of Questions of Law Act; Chapter 51, Article 1A, West Virginia Code, as amended, which questions the federal circuit court held determinative of issues before that court?

3. Whether there was sufficient proof of damages done to petitioners' land by respondent to enable the jury to fix the amount thereof with reason, or, conversely, where there is certainty of proof that damage was done to petitioners' land by respondent, can any possible uncertainty as to the dollar amount thereof preclude the right of recovery or prevent a jury award?

4. If this Honorable Court should resolve the foregoing against petitioners, whether, in the retrial of this case, the petitioners are entitled to the protection of the restrictive land use covenants in the lease from petitioners' grantor to respondent's predecessor in interest or, conversely, whether respondent is bound by such covenants, in measuring the respective rights of the parties to this litigation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent portions of the Seventh Amendment of the United States Constitution and the Uniform Certification of Questions of Law Act, Chapter 51, Article 1A, Code of West Virginia, as amended, are set forth in the Appendix at pp 13a and 14a.

STATEMENT

This action arises out of injuries suffered by petitioners caused by the careless and negligent drilling operations conducted on their land by respondent PennzoiI Company.

Respondent's right to drill for oil stems from a lease agreement entered into in 1904. The lease contained restrictive covenants relating to the exercise of such right, i.e., location of wells, protection of cultivated areas of the land, placement and burial of gas lines and free gas for the lessor which covenants were partly or wholly violated by the respondent. The lessee drilled one (1) well in 1915 and four (4) wells in 1974. The drilling methods used in 1974, and which are the subject of petitioners' complaint, were radically different from the drilling methods used in 1904, the former necessitating commitment of substantially more land for each well site and maintenance (approximately 60,000 square feet) than the latter (approximately 4800 square feet).

Notwithstanding the covenant contained in their lease reserving "from the leased land 300 feet around the buildings on which no well shall be drilled" respond-

ent has drilled a well within two hundred two feet (202') of one of petitioner's residence and one hundred ten feet (110') from petitioner's cellar house. Respondent's storage tank or rather one (1) of its storage tanks and other facilities are located in cultivated areas of petitioners' land notwithstanding the lease covenant which prohibits it. Unnecessary roadways have been built, ditches have been omitted, streams have been filled with sediment and the surface of the subject land has been squandered by respondent's wasteful land use practices. Another roadway has effectively channeled runoff water into petitioners' streams and into their cellar house. Respondent cleared an excessive amount of timber from petitioners' land and has rendered said timber valueless. Respondent's blasting has caused damage to petitioners' residence and in addition has scattered large amounts of debris over petitioner's land. Salt water has been permitted to flow over petitioners' land.

Judgment against respondent and for petitioners was obtained in the United States District Court for the Southern District of West Virginia on September 15, 1977, after a jury trial. Respondent's motion for judgment notwithstanding the verdict, or, in the alternative, to set aside the verdict and grant a new trial was denied by order entered November 11, 1977.

Respondent appealed certain rulings of the District Court to the United States Court of Appeals for the Fourth Circuit. By opinion dated May 21, 1979, the Circuit Court reversed the jury verdict and remanded the case for further proceedings (new trial) to the District Court. Petitioners sought rehearing by the Circuit Court but, by order entered July 12, 1979, were denied. (appendix at pp 1a-10a and p. 11a)

The Circuit Court, at page 3 of its opinion, considered

the District Court bound by the state rule of *Adkins* v. *United Fuel Gas*, 134 W. Va. 719, 61 S.E. 2d 633 (1950). This case, as interpreted by the Circuit Court held that the issue of unreasonable use is one to be determined by the Court and not by a jury. At page ten (10) of its opinion, the Circuit Court also concluded that petitioners were not entitled to the protection of those provisions or covenants in respondent's lease relating to protection of the surface estate. Furthermore, the Circuit Court ruled that the monetary value of petitioners' injuries must be proven with specificity in addition to proof of damage.

REASONS FOR GRANTING THE WRIT

There are serious questions of public policy involved here as to the comparative rights of differing landed interests and the preservation of the land itself which make this case a peculiarly appropriate one for the exercise of this Court's jurisdiction. The Circuit Court has erred in creating an exception to the rule enunicated in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.* 356 U.S. 525, 78 S.Ct. 893, 2 L. Ed. 2d 953 (1958). To permit the decision of the Circuit Court to stand will cause uncertainty where there has been relative certainty since the *Byrd* decision was announced in 1958.

1. The decision of the Court below should be reviewed because it is in direct conflict with prior decisions arising out of this and other circuits on the issue of (a) whether or not reasonable land use is a factual question for jury determination, and (b) whether such issue can be withheld from a jury by application of state law in contravention of the Seventh Amendment.

If the decision of the Court below is permitted to stand, the constitutionally correct procedure in federal courts for resolving land use issues will be hopelessly

confused. States may be permitted to remove all issues relating to what is reasonable land use from jury consideration by simply declaring such issues to be nonfactual, thereby effectively limiting the application of the Seventh Amendment.

Assuming without conceding that West Virginia Law dictates the procedure gleaned by the Court below from *Adkins* v. *United Fuel Gas Co.*, 134 W.Va. 719, 61 S.E.2d 63 (1950), and that such procedure requires the Court rather than the jury to decide the question of reasonable use, then and in such event, state law is patently in conflict with federal law as enunciated in *Byrd, supra; Denneny* v. *Siegel,* 407 F.2d 433 (1969), and a host of federal court cases. The Circuit Court cites *Byrd, supra,* and then seeks to interpret it to support reversal of the District Court judgment based, as it was, upon jury determination of all factual issues. This cannot rationally be done.

Byrd clearly affirms the right to a jury determination of factual issues . . . "in accordance with federal practice, notwithstanding state practice . . . . Federal Court, in a diversity case, is not bound, under the rule of *Erie* v. *Tompkins, supra,* to follow the state practice which might point to a different result." *Byrd, supra.*

The *Adkins* case has been treated by the Circuit Court of Appeals for the Fourth Circuit exactly as it treated *Byrd.* It has divested the jury of its normal functions. However, the Supreme Court in *Byrd* flatly denied the validity of that position, and the same result should obtain in the case at bar.

"The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common law actions, it

distributes trial functions between judge and jury and, under the influence—if not command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Byrd, supra.*

"It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts . . . . In light of the Seventh Amendment, the function assigned to the jury is an essential factor in the process for which the Federal Constitution provides." *Byrd, supra.*

The Court below appears to misunderstand the opinion of the Court in *Byrd* delivered by Mr. Justice Brennan, and, worse yet, employs the dissenting rationale of Mr. Justice Whittaker to reach an opposite result from that which is reached by the Supreme Court.

The doctrine laid down in *Byrd* has been followed in a number of subsequent cases, including *Denneny, supra,* wherein the Court held in principle part as follows, "This latter proposition—that federal law governs the judge-jury relationship in diversity actions was confirmed by the Supreme Court in *Byrd, supra* . . . (which) made it clear that state law could not contravene the federal rule that *only* the jury may resolve disputed questions of fact."

There can be little doubt that the rule in *Byrd,* properly applied, amply demonstrates the correctness of the District Court's action and the incorrectness, indeed the unconstitutionality, of the Circuit Court decision.

Nor can the tortured, bifurcated court-to-court, jury-to-court, and court-back-to-jury procedure, directed by the Court below presumably following the *Adkins* formula (Appendix at ap. 5a), be justified on the grounds that the issue of unreasonable use is not a factual issue. The is-

sue of reasonable use or necessity is clearly factual under prevailing West Virginia and U. S. Fourth Circuit law. *Mullins* v. *Beatrice Pocahontas Company,* 432 F.2d 314 (4th Cir., 1970); *Johnson* v. *Junior Pocahontas Coal Co., Inc.,* ____W. Va.____, 234 S.E. 2d 309 (1977).

Furthermore, if the "nature and extent" of the damage done to petitioners' land is a factual issue to be left to the jury (Appendix at pp. 5a and 10a) surely the question of reasonableness is inextricably bound up in that issue. Otherwise, the jury's finding on "nature and extent" is virtually meaningless. To circumvent *Byrd and Denneny* and the Seventh Amendment, one need only take a truly factual question, such as the extent of respondent's unreasonable use, and call it a legal issue. Application of the reasonable land use standard, like application of the reasonable man standard, is indubitably a jury function. The reasonable man standard occurs ubiquitously throughout the case law and is invariably applied by the jury, and not by the Court.

2. The West Virginia Uniform Certification of Questions of Law Act, Chapter 51, Article 1A, West Virginia Code, as amended, provides for the consideration by the Supreme Court of Appeals of West Virginia, on certification by a federal court, of any question of substantive law wherein West Virginia law governs. If the question of reasonable use is construed as a substantive matter and thus governed by state law, then prevailing state law must first be enunciated by the State Supreme Court of Appeals, and it should not be left to the federal court to determine whether *Adkins* or the leading cases of *Mullins* or *Johnson* apply.

The action of the Court below in applying *Adkins* rather than *Mullins* to the facts of this case, without first seeking clarification or resolution of the obvious conflict

between these cases, deserves to be reviewed. The Court of Appeals, in petitioners' view, has reversed state law on a subject which that same Court views as the province of the state. In the process, the rights of owners of mineral estates have been greatly and unjustifiably enhanced at the expense of the surface owners.

3. The Circuit Court's second ground for reversal of the District Court judgment involved the jury's right to assess the quantum of petitioners' damages in the light of "a great deal of evidence concerning the damage done to their land" (Appendix at p. 6a) but insufficient evidence as to the monetary value of that damage. The Circuit Court's position in this regard is contrary to the weight of authority. The Court below relies upon *Jarrett* v. *E. L. Harper & Son, Inc.,* ____W.Va.____, 253 S.E. 2d 362 (1977), which does not relate to the precise issue raised in the case at bar, but which simply overrules cases that distinguish between temporary and permanent damages to real property, and approves new elements thereof such as annoyance and inconvenience.

The fundamental principle which is overlooked by the Court below is that "there must be a minimum of interference with the jury . . . . Traditional respect for the jury and its constitutional benison requires that it be allowed to find whatever facts are reasonably suggested by the evidence." Wright and Miller, *Federal Practice and Procedure;* Civil Sec. 9-35, p. 545.

There is a distinction between the quality of proof necessary to establish the fact that the petitioners sustained some damage and the measure of proof necessary to enable the jury to fix the amount. Although formerly the tendency was to restrict the recovery to such matters as were susceptible of having attached to them an exact pecuniary value, it is now generally held that the uncer-

tainty which prevents a recovery is uncertainty as to the fact of the damage and not as to its amount, and that where it is reasonably certain that damage has resulted, mere uncertainty as to the amount itself will not preclude the right of recovery nor prevent a jury decision awarding damages. *Bigelow* v. *RKP Radio Pictures, Inc.*, 327 U. S. 251, 66 S.Ct. 574, 90 L.Ed. 652; *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515; *Chesapeake & P. Tel. Co.* v. *Carless*, 127 Va. 5, 102 S.E. 569, 23 A.L.R. 943 (1920); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 2d 248, 75 L.Ed. 544; *Worrie* v. *Boze*, 198 Va. 533, 95 S.E.2d 192, 62 A.L.R. 2d 1315. The modest verdict returned by the jury in the case at bar is amply supported by the evidence.

4. Should this Honorable Court decline to grant the writ sought by your petitioners on the foregoing grounds, then and in that event, your petitioners urge your Honors to address the reversible error committed both by the District Court and the Circuit Court regarding an instruction to the jury on the application of certain covenants in the lease under which respondent obtained their property rights.

According to the Court below, "there was a great deal of evidence to show that Pennzoil . . . violated the terms of its oil and gas lease." However, since petitioners "were not parties to the lease and had no interest therein," they were not entitled to the protection afforded by its provisions.

In 1904, A. E. Robertson, the original fee simple owner of the land in question, leased the oil and gas interests therein to the respondent's predecessor in interest. The relevant covenants in the Robertson lease (see Appendix at pp 14a-17a) are as follows:

(a) A lease is granted hereunder "for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of the said products . . . ."

(b) There is reserved from the leased land "300 feet around the buildings on which no well shall be drilled. . . ."

(c) The party of the second part (lessee) "covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm, to bury gas lines two feet below the surface when notified to do so, and pay all damages to growing crops by reason of operations."

In 1920, Robertson conveyed the surface of his land and all minerals other than the oil and gas to the petitioners' predecessor in interest while reserving only the oil and gas (previously leased to the respondent's predecessor).

From these facts the Court below discerned that the intent of the parties to the original lease (Robertson and respondent's predecessor) was that reasonable use of the surface at the time required compliance with the lease conditions and covenants cited above, but that reasonable use of the surface in the future would not so require.

The Circuit Court's reasoning does not comport with West Virginia law which says that where a covenant is of such character that the benefits and burdens pass with the land to the assignee, into whatsoever hands the land may come, the covenant is said to run with the land. *Hurxthal* v. *Boom Co.*, 53 W.Va. 87, 44 S.E. 520 (1903). If some interest in the land is granted (leased) and the grantee (lessee) covenants that he will do an act which concerns the land and which thus becomes united to it

so that it affects the value of the land in whosoever hands it may come, such covenant runs with the land. *Lydick* v. *B & O R.R.* 17 W. Va. 427, (1880) 5A M.J., Covenants, § 12.

The general rule is that oil and gas leases will be construed liberally in favor of the lessor and strictly against the lessee. *Martin* v. *Consolidated Coal Corp.*, 101 W. Va. 721, 133 S.E. 626 (1926); *Jackson* v. *Kent*, 106 W. Va. 37; *Eclipse Oil Co.* v. *South Penn Oil Co.*, 47 W. Va. 84, 34 S.E. 923 (1899); *Yoke* v. *Shay*, 47 W. Va. 40, 34 S.E. 748 (1899); *Cotiga Dev. Co.* v. *Gas Co.*, 147 W. Va. 484, 2d 626 (1962).

A covenant to bury pipelines . . . touches and concerns the land and therefore both right and duty should run to the successive owners of the surface and mineral estates. Both the benefit and burden of such covenants are capable of running with the lease and with the reversion. *Mobile Oil Corp.* v. *Brennan* 385 F.2d 951, 270 & GR 656, 659 (5th Cir., 1967); Kuntz, *Law of Oil and Gas* (1972).

. . . The benefit of the covenant runs with the estate intended to be benefited. By application of that principle, the benefit of the covenant in a surface damage clause and the benefit of a covenant to bury pipelines below plow depth run with the surface estate and will continue to run until expressly removed by a later conveyance. Similarly, a clause restricting well location by prohibiting drilling within 300 feet of a residence was held to be for the benefit of persons owning interests within the prohibited area. *Hart* v. *Sinclair Oil & Gas Co.*, 351 S.W.2d 142, (Tex. Cir. App. 1961); *Manges* v. *Gulf Oil Corp.*, 394 F.2d 487 (5th Cir. '68); *Mobil Oil Corp.* v. *Brennan, supra; McFarlane* v. *Gulf Prod. Co.*, 204 S.W. 460 (Tex. Cir. App. 1918).

Benefits (oil and gas rights), as well as burdens and conditions for the receipt of those benefits, were granted to the respondent's predecessor under the same instrument. The defendant should not be allowed to claim the benefits of that grant while rejecting the burdens therof, notwithstanding the ruling to the contrary of the Court below. *Cummings* v. *United Fuel Gas Company*, 116 W.Va. 599, 182 S.E. 789 (1935).

CONCLUSION

It is petitioner's position that the opinion of the Court below conflicts with established West Virginia law as well as the federal rule and is plainly unconstitutional. The Circuit Court opinion ignores the command of the Seventh Amendment, i.e., that it is the province of the jury to decide factual issues such as what is the reasonable exercise of certain property rights and to assess damages for the unreasonable exercise of such rights. It places landowners, large and small, at the mercy of over-aggressive mineral extractors. Indeed the decision of the Court below, if allowed to stand, not only removes certain factual questions from juries, it also tends to attach rights to servient property interests to which dominent landowners become captive, and render surface owners everywhere virtually helpless to protect themselves against the abuse of their land by rapacious mineral interests.

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted:

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-1151

ROMA MCKINNEY JUSTICE, GLEN JUSTICE, FRED MCKINNEY, BETTY MCKINNEY, MURREL MCKINNEY, ALBERTA MCKINNEY, ALVA MCKINNEY QUINN, JANE MCKINNEY, JAMES MCKINNEY, GEORGINE MCKINNEY, CHARLES MCKINNEY AND CINDY MCKINNEY,

Appellees,

v.

PENNZOIL COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT HUNTINGTON. CHARLES H. HADEN, II, DISTRICT JUDGE.

Argued: February 6, 1979 Decided: May 21, 1979

Before BRYAN, Senior Circuit Judge, RUSSELL and HALL, Circuit Judges.

Fred L. Davis, Jr. (William A. Trainer, Davis, Davis, Hall & Clovis on brief) for Appellant; Ray E. Ratliff, Jr. (Paul J. Kaufman, Kaufman and Ratliff on brief) for Appellees.

HALL, Circuit Judge:

Plaintiffs, owners of the surface rights to certain land situate in Lincoln County, West Virginia, brought suit in state court against defendant Pennzoil Company, the lessee of oil and gas rights in the land, alleging that Pennzoil had unreasonably and negligently damaged the surface incident to its drilling of several oil wells. Defendant removed the case to federal district court on grounds of diversity. 28 U.S.C. §1441(a). After several years of pretrial manuevering and an eleventh-hour demand by plaintiffs for jury trial,[1] the case came on for trial. The district court, disagreeing with defendant's contention that under the substantive law of West Virginia the issue of unreasonable use is one to be determined by the Judge, submitted the issue to the jury. The jury returned a verdict for the plaintiffs and awarded damages in the amount of $10,000. Defendant appeals certain rulings of the district court. We reverse.

The land in question was originally owned in fee simple by A. E. Robertson. In 1904 Robertson executed an oil and gas lease to the Holly Oil Company, Pennzoil's predecessor in interest. In 1920 Robertson sold the land to B. P. McKinney, from whom these plaintiffs have acquired their interests by inheritance or devise. The 1920 deed contained the following reservation:

> ". . . the Parties of the first part [Robertson] does hereby reserve the Oil & Gass & right to operate same except Gass for domestic use as is set forth in leese."

The record is silent as to whether A. E. Robertson is presently alive and, if he is not, to whom he devised or conveyed the oil and gas. Therefore the division of

[1]/The complaint was filed on March 11, 1975, and demand for jury trial was made on June 23, 1977.

rights in the land is as follows: (1) the surface and all minerals other than oil and gas are owned by the plaintiffs, taking through B. P. McKinney, (2) the oil and gas are owned and leased to Pennzoil by A. E. Robertson or by unnamed parties taking through Robertson, and (3) Pennzoil is the lessee of oil and gas rights under the lease, taking through Holly Oil Company.

First. The controlling issue in this litigation is whether Pennzoil, in its drilling operations, exceeded its common law right "to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate." *Squires* v. *Lafferty*, 95 W. Va. 307, 121 S.E. 90 (1924). The West Virginia Supreme Court of Appeals has held that the issue of unreasonable use is one to be determined by the Court.

> "[W]e do not think that whether the plaintiff's rights have been invaded, or whether the defendant has exceeded its rights are questions of fact for determination of the jury. In a case where there is a dispute of fact, the jury should find the facts, and from such finding of facts by the jury it is the duty of the court to determine whether the use of the surface by the owner of the minerals has exceeded the fairly necessary use thereof, and whether the owner of the minerals has invaded the rights of the surface owner, and thus exceeded the rights possessed by the owner of such minerals."

Adkins v. *United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950).[2]

It has been held that federal rules usually control the allocation of function between judge and jury in diversity

[2]/Most severance of minerals from the surface of land in West Virginia was effected several generations ago. Property owners have since learned, often in court, that their surface ownership gives them "no right to prevent such use of the surface as [is] reasonable and necessary for the production and transportation of gas," even if the surface is damaged thereby. *Porter* v. *Mack Mfg. Co.*, 65 W. Va. 636, 64 S.E. 853 (1909).

cases. *Byrd* v. *Blue Ridge Rural Electric Co-operative, Inc.*, 356 U.S. 525, 533-40 (1958). *See also Wratchford* v. *S. J. Groves § Sons Co.*, 405 F.2d 1061, 1065-66 (4th Cir. 1969). We think, however, that in a real property case arising under West Virginia law the rule of *Adkins* is binding on a federal court sitting in diversity. We perceive no conflict with the Supreme Court's decision in *Byrd*.

In *Byrd*, the Court had before it a negligence action brought against an electric power company by the employee of a construction contractor. The employee had been injured while connecting power lines to one of defendant's substations.

Jurisdiction was based on diversity of citizenship, and South Carolina law controlled the litigation. One affirmative defense raised was that the claim was within the exclusive jurisdiction of the state's Workmen's Compensation Act. The validity of this defense turned on disputed issues of fact. Under South Carolina law, the factual issues were to be decided by the judge rather than the jury. The Supreme Court rejected defendant/respondant's argument that this rule was binding on a diversity court under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), holding that

> "[a]n essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, *assigns the decisions of disputed questions of fact to the jury.*"

Byrd v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. at 537 (emphasis added and citations omitted).

The Court noted that the state rule was grounded merely in habit, since under past practice the issue of

whether an employee was covered under Workmen's Compensation had usually come before the state court on appeal from a decision of South Carolina's Industrial Commission. The rule reflected, at most, "a policy that administrative determination of 'jurisdictional facts' should not be final but subject to judicial review." *Id.* at 536 (citations omitted). The Court found no indication that the rule was "intended to be bound up with the definition of the rights and obligations of the parties." *Id.* Therefore, it was "merely a form and mode of enforcing [the jurisdictional defense]," *id.*, and under these circumstances, the strong federal policy of allowing the jury to determine disputed issues of fact was held paramount to the state rule.

In contrast, the rule articulated in *Adkins* v. *United Fuel Gas Co., supra,* is one of state property law. Unreasonable use of land by a mineral owner is not measured by the tort standard of the ordinary reasonable man; rather, it is measured by concrete legal standards rooted in the common law. *See Adkins* v. *United Fuel Gas Co.*, 61 S.E.2d at 635-36 and cases discussed therein. It is not a matter readily susceptible of jury determination. The rule of *Adkins* is not only bound up with but assures the continuity of those substantive rights and obligations of the parties which were defined generations ago. *Compare Wratchford* v. *S. J. Groves & Sons Co.*, 405 F.2d at 1065-66.

Most importantly, under *Adkins* disputed issues of fact are not assigned to the judge. All factual issues are resolved by the jury, and the ultimate question of property law is then decided by the judge on the basis of the jury's findings. See p. 8 *infra*. We think this allocation of judge/jury functions comports with the considerations discussed in *Byrd* v. *Blue Ridge Rural Electric Coopera-*

tive, Inc., supra, and we therefore hold that the rule of *Adkins* is binding on a federal court sitting in diversity.

Although plaintiffs seek to distinguish *Adkins* on the ground that the defendant in that case was the owner of the minerals, as well as the mineral operator, we think this a distinction without a difference. Subject of course to any restrictions in the lease,[3/] the lessee/operator enjoys the same right to use the surface as does the lessor/owner, *e.g., Atkinson* v. *Virginia Oil & Gas Co.*, 72 W. *Va.* 707, 79 S.E. 647 (1913), in order that both parties may benefit from their interests in the mineral estate.

Therefore, the district court erred in submitting the issue of unreasonable use to the jury; the jury's verdict is reversed and the case remanded for a new trial. Under *Adkins,* the disputed issues of fact concerning the nature and extent of the damage caused by defendant to plaintiffs' land should be submitted to the jury, perhaps on special interrogatories. The court will then determine as a matter of law whether Pennzoil has exceeded its right to fairly and reasonably use the surface for enjoyment of its mineral estate. If the court rules that Pennzoil has exceeded its right, it must delineate where unreasonable use began in order that the jury may properly assess damages.

Second. At trial, the plaintiffs put on a great deal of evidence concerning the damage done to their land. There was almost no evidence, however, reasonably specifying the cost to repair the damage or the monetary devaluation of the land, as the district court struck most of plaintiff's' expert witness testimony from the record.

It has long been the rule in West Virginia that damages cannot be based on speculation, guess or conjecture.

[3/]These restrictions may or may not inure to the benefit of the surface owner. See pp. 10-11 *infra.*

E.g., Spencer v. *Steinbrecher,* 152 W. Va. 490, 164 S.E.2d 710 (1968), citing *Rogers* v. *Bailey,* 68 W. Va. 186, 69 S.E. 698 (1910). On remand, should the district court find liability against Pennzoil, the plaintiffs must prove damages under the rule of *Jarrett* v. *E. L. Harper & Son, Inc.,* 235 S.E.2d 362, 365 (W. Va. 1977).

> "When realty is injured the owner may recover the cost of repairing it plus his expenses stemming from the injury including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover the money equivalent of its lost *value* plus his expenses resulting from the injury including loss of use during the time he has been deprived of his property. * * * [A]nnoyance and inconvenience are [also] properly considered as elements in the measure of damages that plaintiffs are entitled to recover, provided that these considerations are measured by an objective standard of ordinary persons acting reasonably under the given conditions."

(Emphasis in original)

Third. Pennzoil contends that the district court erred by refusing to instruct the jury that any damages must be specifically allocated to subdivided parcels of the land belonging to individual plaintiffs. This argument is without merit.

The issue arose when plaintiff Charles McKinney was added as a party plaintiff shortly before trial, after counsel realized that a parcel of the land had been deeded over to him by plaintiff Roma McKinney Justice. The evidence at trial indicated that this parcel, on which three of Pennzoil's five wells were located, sustained the heaviest damage. Pennzoil argues that Charles McKinney, who did not appear at trial, was apparently unin-

terested in the litigation, and that any award for damage to his parcel should not "fall into the hands" of other family members. We disagree. Plaintiffs have sued to recover damages for injury to the whole of their land; the apportionment of recovery among the various family members according to their respective interests in the land is of no concern to Pennzoil.[4/] The district court has flexibility in fashioning relief for parties properly joined, Fed.R.Civ.P. 20 (a), and did not abuse his discretion in allowing a so-called "unitary judgment."

Fourth. At trial plaintiffs put on a great deal of evidence tending to show that Pennzoil, in its drilling operations, violated the terms of its oil and gas lease. Upon Pennzoil's motion at the close of all the evidence, the district court ruled that plaintiffs were not entitled to assert the terms of the lease as they were not parties to it and had no interest therein. The court accordingly refused to instruct the jury on the provisions of the lease. We find this ruling to be correct.

The 1904 oil and gas lease executed by A. E. Robertson to Holly Oil Company contained a number of covenants including, *inter alea,* the following:

> "The Lessors shall have gas for the dwelling from any gas well on said premises free by making connections."

In the 1920 deed to B. P. McKinney, Robertson reserved the oil and gas operating rights,

> "except Gass for domestic use as is set forth in leese."

We think these documents, read together, express the respective parties' intention that the only lease covenant

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4/At any event, counsel for plaintiffs informed this court at oral argument, dehors the record, that Charles McKinley's parcel has since been deeded back to Mrs. Justice.

which would inure to the benefit of the surface owners was the "free gas" clause. Therefore, plaintiffs have no standing to assert that Pennzoil has violated any other covenants in the lease; this right inures only to the lessors under that lease.

Fifth. Pennzoil assigns as error certain of the district court's evidentiary rulings allowing nonqualified expert witnesses to testify as to damages sustained by plaintiffs, allowing plaintiff Fred McKinney to give opinion testimony as to the value of timber on the land destroyed by Pennzoil, and allowing plaintiffs to put on evidence concerning Pennzoil's failure to obtain their permission prior to conducting drilling activities.

The first argument is without merit. After the challenged witnesses had testified, the court agreed with Pennzoil that they were not properly qualified; he struck their testimony from the record and cautioned the jury to disregard it. We think these actions sufficient to protect Pennzoil from any prejudice.

Fred McKinney's testimony was based on personal knowledge and otherwise met the requirement of Fed.R.Ev. 701. He stated that he had personally measured the timber felled by Pennzoil, and as recently as 1974 had experience in determining the market price of timber. At any event, a landowner's opinion concerning the value of his land is certainly admissible. *E.g., West Virginia Department of Highways* v. *Sickles,* 242 S.E.2d 567 (W.Va. 1978). We think the district court properly allowed the testimony.

However, at trial on remand plaintiffs may not testify as to Pennzoil's failure to obtain their permission prior to conducting drilling activities. As surface owners, plaintiffs have no "veto power" over the mineral operator's decision to drill. Testimony concerning failure to obtain

permission could raise an inference that Pennzoil has breached a duty to plaintiffs—a duty it does not owe.

Sixth. Finally, Pennzoil assigns as error certain of the district court's procedural rulings allowing plaintiffs to amend their complaint (to add Charles McKinney as party plaintiff) ten days before trial, and granting plaintiffs' last-minute request for jury trial. Both of these rulings were within the sound discretion of the court, Fed.R.Civ.P. 15(a), 39(d), and we do not think he abused his discretion on the facts of this case.[5/]

The verdict of the jury is reversed, a new trial awarded, and the case remanded for further proceedings not inconsistent with this opinion.

REVERSED.

[5/]Although submission of the unreasonable use issue to the jury was error, plaintiffs were entitled to have a jury determine the nature and extent of injury to their land and, if the court ruled that Pennzoil's use of the land was unreasonable, to determine proper damages.

United States Court of Appeals

FOT THE FOURTH CIRCUIT

No. 78-1151

ROMA McKINNEY, ET AL.,

Appellees,

v.

PENNZOIL COMPANY,

Appellant.

ORDER

Upon consideration of the appellees' petition for rehearing by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Bryan, Judge Russell, and Judge Hall.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk

FILED

JUL 12 1979

WILLIAM K. SLATE, II
CLERK

United States District Court

FOR THE

SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

ROMA McKINNEY, et al,
Plaintiffs,

vs.

PENNZOIL COMPANY,
Defendant.

Civil Action File No. 75-0083-H

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Charles H. Haden II, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in words and figures as follows:

> "We, the Jury, find in favor of the Plaintiffs and against the Defendant, and assess Plaintiffs total damages in the sum of $10,000.00
>
> September 15, 1977. (Date) /s/ Marvin C. Threlkeld (Foreman)

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiffs recover of and from the Defendant the sum of TEN THOUSAND DOLLARS ($10,000.00), with interest thereon as provided by law and their costs of this action expended.

Dated at Huntington, West Virginia, this 15th day of September, 1977.

JAMES A. MCWHORTER
Clerk of Court

RAY D. SOMMERVILLE
Deputy

UNITED STATES CONSTITUTION
[Amendment VII]

[*Trial by Jury in Civil Cases*]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT.

§ 51-1A-1. Power to answer.

The supreme court of appeals of West Virginia may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of appeals of this state. (1976, c. 36.)

§ 51-1A-2. Method of invoking.

This article may be invoked by an order of any of the courts referred to in section one [§ 51-1A-1] of this article upon the court's own motion or upon the motion of any party to the cause. (1976, c. 36.)

§ 51-1A-3. Contents of certification order.

A certification order shall set forth:

(1) The questions of law to be answered; and

(2) A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose. (1976, c. 36).

§ 51-1A-4. Preparation of certification order.

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the supreme court of appeals of West Virginia by the clerk of the certifying court under its official seal. The supreme court of appeals of West Virginia may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the supreme court, the record or portion thereof may be necessary in answering the questions. (1976, c. 36.)

A G R E E M E N T , Made and entered into the 1 day of August A.D. 1904, by and between A. E. Robertson & C. W. Robertson of Tango County of Lincoln and State of W. Va., parties of the first part, and Holley Oil & Development Co. Corporation *party* of the second part:

W I T N E S S E T H , that the said parties of the first part, for and in consideration of the sum of $24.00 Dollar —to them in hand well and truly paid by the said part . . . of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the said *party* of the second part, to be paid, kept and performed, *hav* granted, demised, leased and let, and by these presents do grant, demise, lease and let unto said *party* of the second part their heirs executors, administrators or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of the said products, ALL that certain tract of land, situated in Duval

District, Lincoln County and State of W. Va. on waters of Joes Creek of Trace fork of Mud bounded substantially as follows:

On the North by lands of Sarah Alford;

On the East by lands of Morris Dunlap;

On the South by lands of *Nonay* McCoy;

On the West by lands of J. W. Lipscomb, Containing 96 acres, more or less, reserving, however, therefrom 300 feet around the buildings on which no well shall be drilled by either party except by mutual consent.

It is agreed that this lease shall remain in force for the term of ten years from this date and as much longer as the rent for failure to commence operations is paid, and as long after the commencement of operations as said premises are operated for production of oil or gas.

IN CONSIDERATION OF THE PREMISES the said *party* of the second part covenants and agrees: 1st—To deliver in the pipe lines to the credit of the first parties their heirs or assigns, free of cost, the equal ⅛ part of all oil produced and saved from the leased premises; 2d—to pay fifty dollars per year for the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises; said payments to be made on each well within sixty days after commencement to use the gas therefrom, as aforesaid, and to be paid yearly thereafter while the gas from said well is so used; and 3rd—The lessors shall have gas for the dwelling from any gas well on said premises free by making connections.

Second part . . . covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm; to bury gas lines two feet

below the surface when notified so to do, and pay all damages to growing crops by reason of operations; and further to complete one well in five years from the date hereof, unavoidable delay excepted, or in case of failure so to do, to pay thereafter an annual rental of $24.00 dollars, either directly to the first parties, or by deposit to their credit in the Putnam Co. Bank of Hurrican-, . . ., until such well shall be completed or this lease surrendered for cancellation.

IT IS AGREED that second party shall have the privilege of using sufficient water from the premises to run all necessary machinery, and at any time to remove all machinery and fixtures placed on said premises, and, further, upon the payment of One Dollars at any time by the *party* of the second part their heirs, executors, administrators or assigns, to the parties of the first part their heirs or assigns, said *party* of the second part their heirs executors, administrators or assigns, shall have the right at any time to surrender this lease to first parties for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms; shall cease and determine, and this lease become absolutely null and void.

Witness
W. H. McCallister

Witness the following signatures and seals:

A. E. ROBERTSON (Seal)
C. W. ROBERTSON (Seal)
Holley Oil and Development Co. (Seal)
By J. A. Holley, President.

STATE OF WEST VIRGINIA,
COUNTY OF LINCOLN, SS:

I, Wm. H. McCallister a Notary Public of said County of Lincoln do certify that C. W. Robertson and A. E. Robertson his wife, whose names are signed to the within writing, bearing date the 1 day of Aug. 1904, *hav* this day acknowledged the same before me in my said County.

Given under my hand this 1 day of August A. D. 1904.

Wm. H. McCallister, N. P. (Seal)

LINCOLN COUNTY COURT CLERK'S OFFICE, Oct 18 1904.

This *deed* was this day presented to me in my office, and thereupon, together with the certificate thereto annexed, is admitted to record.

Teste: Robt. Hager, Clerk.

NOTE—The following endorsement was on the back of the above instrument:

"Received for record.....190.....

Recorded Oct 19 1904, in Book 36, page 34.

ROBT. HAGER, *Clerk.*"

W. C. HALSTEIN, *Clerk,*
By W. B. WILKINSON, *Deputy*

Lincoln County Court Clerk's Office, February 7th 1910.

This lease was this day presented to me in my office, and thereupon, together with the certificate thereto annexed, is admitted to record.

Teste: W. C. Halstein, Clerk,

By W. B. Wilkinson, Deputy.

CERTIFICATE OF SERVICE

I, Paul J. Kaufman, attorney for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition For Writ of Certiorari and Appendix upon the respondent by mailing three true copies thereof to its attorneys, Fred L. Davis, Jr., William A. Trainor, Davis, Davis, Hall and Clovis at 700 Market Street, Parkersburg, West Virginia 26101, on this 5th day of October, 1979, by United States Mail, postage prepaid.

PAUL J. KAUFMAN